

BOARD OF APPEALS
for
MONTGOMERY COUNTY
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Case No. S-2566

PETITION OF TAMARA TRAINER RUSS

OPINION OF THE BOARD
(Public Hearing Date: May 14, 2003)
(Effective Date of Opinion: September 10, 2003)

Case No. S-2566 is an application for a special exception pursuant to Section 59-G-2.00 (Accessory Apartment) of the Zoning Ordinance to permit an existing accessory apartment.

The Board of Appeals held a hearing on the application on May 14, 2003. Tamara Trainer Russ appeared in support of the application. James Kwame Edusei, Housing Code Inspector, Montgomery County Department of Housing and Community Affairs (DHCA) also testified. The Board received no correspondence or testimony in opposition to the application.

Decision of the Board: Special Exception **granted** subject
to conditions enumerated below.

EVIDENCE PRESENTED

1. Tamara Trainer Russ, who jointly owns the subject property with her mother [Exhibit No. 15], requests permission to continue the use of an existing accessory apartment. At the public hearing she stated that when she and her mother purchased the house, the tenant was living in the accessory apartment. The subject property is Lot 16, Block D, Whitehall Manor Subdivision, located at 5613 Old Chester Road, Bethesda, 20814, in the R-90 Zone.
2. Maryland National Capital Park and Planning Commission staff analyzed the application and recommend approval [Exhibit No. 17]. Staff finds that the application is consistent with the Bethesda-Chevy Chase Master Plan (April 1990), which supports the R-90 zoning for the subject property, where accessory apartments are permitted by special exception and which also supports

measures to provide affordable housing in the Planning Area. Staff finds that three off-street parking spaces are available in the driveway, and that the accessory apartment will not reduce the safety of pedestrian or vehicular traffic.

Staff further finds that the subject property is served by adequate public facilities, and that the application meets all development standards for the R-90 zone and all general and specific standards for the grant of special exceptions for accessory apartments. Staff notes that the accessory apartment is located in part of the basement of the house, that it is subordinate in size to the main dwelling, and that its entrance is located at the side of the house and is sufficiently screened by existing mature landscaping to maintain the single family residential appearance of the house. Staff confirmed with Jill Trainer, co-owner of the subject property, that Tamara Trainer Russ will live in the house and will receive compensation for only one dwelling unit, that there are no other residential uses on the property and that there is no family of unrelated persons living on the lot.

In a neighborhood defined by Wilson Lane to the north, Bradley Boulevard to the west and south and Fairfax Road, Wessling Lane and Glenbrook Road to the east, staff finds that approval of this accessory apartment will not result in an over-concentration of similar uses

3. DHCA Housing Code Inspector James Kwame Edusei inspected the accessory apartment and submitted a report of the inspection into the record [Exhibit No. 12]. Mr. Edusei stated in his report and at the public hearing that the accessory apartment meets all requirements of the Housing Code, and that, based upon its 254.7 square feet of habitable space, it is suitable for occupancy by no more than two individuals. He noted that there are at least two off-street parking spaces available in the driveway.
4. The accessory apartment is located in a portion of the basement of the house. [Exhibit Nos. 3 and 16].
5. Tamara Trainer Russ stated at the public hearing that she will reside in the main portion of the house.
6. The lot comprises 15,280 square feet. [Exhibit No. 3].
7. The house was built in 1940 and Tamara Trainer Russ and Jill Russ have owned it since January, 2002. [Exhibit Nos. 3 and 15].
8. No exterior modifications are proposed. [Exhibit No. 3].
9. The accessory apartment has the same address as the main house and has a separate entrance at the side of the house which is partially screened by existing landscaping. [Exhibit Nos. 3, 6 and 17].
10. The accessory apartment contains a kitchen, bathroom and a combined living and sleeping area. [Exhibit No. 5].
11. At least two off-street parking spaces are available in the driveway. [Exhibit Nos. 3, 12, 17].

FINDINGS OF THE BOARD

GENERAL STANDARDS

Sec. 59-G-1.2. Conditions for granting a special exception.

59-G-1.2.1. Standard for evaluation. A special exception must not be granted absent the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with the inherent effects, are a sufficient basis to deny a special exception.

The physical and operational characteristics necessarily associated with an accessory apartment include: the existence of the apartment as a separate entity from the main living unit, but sharing a party wall with the main unit; the provision within the apartment of the necessary facilities and spaces and floor area to qualify as a habitable space under the Building Code; provision of a separate entrance and walkway, and sufficient lighting; additional activity from that household, including more use of the outdoor space and more pedestrian and automobile traffic and parking activity; and the potential for additional noise from the additional household.

The accessory apartment in the instant application is subordinate to the main dwelling, has a well-screened separate entrance which maintains the single family appearance of the house, and at least two off-street parking spaces.

The Board finds that none of the physical or operational characteristics of the proposed accessory apartment exceed what would be expected with the use. The Board finds that there will be no non-inherent adverse effects from this proposed accessory apartment.

59-G-1.21. General Conditions.

- (a) *A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

- (1) *Is a permissible special exception in the zone.*

Accessory apartments are permitted by special exception in the R-90 Zone.

- (2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

As detailed below, the application complies with all of these standards.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

The Board adopts MNCPPC technical staff's finding that the application is consistent with the Bethesda Chevy Chase Master Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

No new structures are proposed. The accessory apartment's entrance maintains the single family residential character of the house. At least two off-street parking spaces are available. Therefore, the Board finds that the intensity of the accessory apartment and its impact on surrounding properties will be relatively low and in harmony with the general character of the neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The Board finds, given the availability of off-street parking, maintenance of the single family appearance of the home and limitation on occupancy of

the apartment, that it will have little visual or operational impact on surrounding properties or the general neighborhood, and will not be detrimental to their use, peaceful enjoyment or economic development.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The accessory apartment is screened from view and will entail no activity to create the above-listed objectionable effects.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendation of a master or sector plan do not alter the nature of an area.*

The Board adopts MNCPPC staff's finding that the accessory apartment will not create an over-concentration of similar uses or adversely affect the residential nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The Board finds no evidence that the accessory apartment will have any of the above-listed effects.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer public roads, storm drainage and other public facilities.*

The subject property is served by adequate public facilities.

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception.*

Not applicable.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be,*

must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.

The Board adopts MNCPPC staff's finding that the accessory apartment will not adversely affect pedestrian or vehicular safety.

SPECIFIC STANDARDS

Sec. 59-G-2.00. Accessory apartment.

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

(a) Dwelling unit requirements:

- (1) Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.*

Only one accessory apartment is requested.

- (2) The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:*

- (i) The lot is 2 acres or more in size; and*
- (ii) The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.*

Located in the basement, the accessory apartment shares at least one party wall in common with the main house.

- (3) An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.*

No addition is requested.

(4) The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.

The house, built in 1940, is 63 years old.

(5) The accessory apartment must not be located on a lot:

- (i) That is occupied by a family of unrelated persons; or*
- (ii) Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

None of these conditions exist at the subject property.

(6) Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.

The Board finds that the side entrance to the accessory apartment, partially screened by existing landscaping, preserves the single-family appearance of the dwelling.

(7) All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.

No external modifications are proposed.

(8) The accessory apartment must have the same street address (house number) as the main dwelling.

The accessory apartment has the same address as the house.

(9) The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.

The apartment contains 254.7 square feet of habitable area, and, occupying a portion of the basement, is subordinate to the main dwelling.

(b) Ownership requirements:

(1) The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary

absence may be increased by the Board upon a finding that a hardship would otherwise result.

Tamara Trainer Russ will live in the main dwelling unit.

- (2) Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the applicant, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.*

Ms. Russ became a Joint Owner of the property in January, 2002, thus this requirement is satisfied.

- (3) Under no circumstances is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.*

Ms. Russ stated that she will comply with this restriction.

- (4) For purposes of this section, "owner" means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the board.*

Tamara Trainer Russ is a Joint Owner of the subject property as evidenced by the deed submitted as Exhibit No. 15.

- (5) The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.*

Not applicable.

(c) Land use requirements:

- (1) The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.*

The lot contains 15,280 square feet.

- (2) *An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in an excessive concentration of similar uses in the general neighborhood of the proposed use (see also Section 59-G-1.21(a)(6) which concerns excessive concentration of special exceptions in general).*

The Board adopts MNCPPC staff's finding that the accessory apartment will not create an over-concentration of similar uses or adversely affect the residential nature of the area.

- (3) *There shall be adequate water supply and sewage disposal systems to serve the occupants of both the accessory apartment and the main dwelling.*

The subject property is served by adequate public facilities.

- (4) *Adequate parking shall be provided. There must be a minimum 2 off-street parking spaces, unless the Board makes either of the following findings:*

(i) *More spaces are required to supplement on-street parking; or*

(ii) *Adequate on-street parking permits fewer off-street spaces.*

Off-street parking spaces may be in a driveway but otherwise shall not be located in the yard between the front of the house and the street right-of-way line.

At least two off-street parking spaces are available in the driveway.

- (5) *Accessory apartments shall not be detrimental to the use and peaceful enjoyment of surrounding properties or the general neighborhood, and shall cause no objectionable noise, traffic or other adverse impacts.*

The Board finds, given the availability of off-street parking, maintenance of the single family appearance of the home and limitation on occupancy of the apartment, that it will have little visual or operational impact on surrounding properties or the general neighborhood, and will not be detrimental to their use, peaceful enjoyment or economic development.

Therefore, based upon the foregoing the Board **grants** the special exception subject to the following conditions:

1. Petitioner shall be bound by her testimony and exhibits of record, to the extent that such evidence and representations are identified in the Board's opinion granting the special exception.

2. Pursuant to the provisions of the Montgomery County Housing Code, and based upon the square footage of its habitable area, the accessory apartment is suitable for occupancy by no more than two persons.

On a motion by Angelo M. Caputo, seconded by Louise L. Mayer, with Allison Ishihara Fultz and Donna L. Barron, Vice Chairman in agreement and Donald H. Spence, Jr., Chairman necessarily absent, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

Donna L. Barron
Vice Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 10th day of September, 2003.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.